

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIGUEL MALDONADO,

Defendant.

Case No. 14-CR-1232-L

**JUDGMENT AND ORDER
GRANTING
DEFENDANT'S MOTION
TO DISMISS THE
INDICTMENT
[ECF No. 15.]**

Defendant is charged in a one-count indictment with attempted entry after deportation, in violation of 8 U.S.C. § 1326(a) and (b). Defendant has been physically removed from the United States pursuant to reinstatement of a previous order granting voluntary departure, and ordering deportation in the alternative. Defendant has filed a Motion to Dismiss the Indictment on the basis that there is no valid order of removal upon which the government may base its prosecution. (Doc. 15.)

Defendant contends: 1) that the reinstatement of an order granting voluntary departure cannot serve as a valid removal order within the meaning of 8 U.S.C. § 1326, and that as a result the 2012 reinstatement order referenced in the indictment is invalid; 2) that the Immigration Judge ("IJ") never advised him during the 1986

1 removal proceedings of suspension from deportation or registry, thereby violating
2 his due process rights and invalidating the deportation order; and 3) that the INS
3 violated Mr. Maldonado's due process rights by recommending the denial of his
4 initial naturalization petition, by failing to timely adjudicate his subsequent
5 petitions, and by failing to respond to his requests for documents. (Def.'s Mot. p.
6 17.)

7 8 **FACTUAL BACKGROUND**

9 Mr. Miguel Maldonado came to the United States in 1970 with his future
10 wife and child on a visitor's visa from Peru that was originally set to expire on
11 August 24, 1974. (*See* Doc. 15, Ex. A.) He married his wife in 1971, and the two
12 had two children in the United States. (*See* Doc. 15, Ex. B (marriage certificate);
13 Ex. C, D (birth certificates).) Mr. Maldonado overstayed his visa after receiving a
14 six-month extension. (*See* Doc. 15, Ex. GG.) According to a 1989 Immigration
15 Appellate order, he received two convictions for shoplifting in 1972. (*See* Doc. 15,
16 Ex. FF, p. 2.)

17 Mr. Maldonado voluntarily enlisted in the United States Army in 1976
18 during the period of Vietnam hostilities. *See* 8 C.F.R. § 329.2 (defining the period
19 of Vietnam hostilities under U.S.C. § 1440 as between February 28, 1961 and
20 October 15, 1978). (*See* Doc. 15, Ex. E.) According to the 1986 order of the IJ, he
21 was able to enlist by purchasing a false birth certificate stating he was a natural
22 born citizen from Puerto Rico. (*See* Doc. 15, Ex. BB, p. 8.) He served for three
23 years and received an honorable discharge in 1979. (*See* Doc. 15, Ex. F.)

24 Mr. Maldonado applied to become a United States citizen in 1979. (*See* Doc.
25 15, Ex. G.) In 1979 he took and passed his naturalization exam, and he swore
26 allegiance to the United States. (*See id.*) Mr. Maldonado contends that the
27 examiner recommended denial on the grounds that Mr. Maldonado was not a
28 lawful permanent resident and that he had improperly enlisted in the army. (*See*

1 Def.'s Mot. p. 4:12-18.)

2 Mr. Maldonado asserts that in 1980 he withdrew his original petition for
3 naturalization because he "was led to believe that the designated examiner had
4 made a final and non-reviewable decision on his application for citizenship"
5 (Def.'s Mot. p. 4:12-18 (citing Doc. 15, Ex. H, a 1983 letter from Mr. Maldonado's
6 then-immigration attorney to the Immigration and Naturalization Service ("INS")
7 that would seem to provide no support for this statement).)¹

8 In 1981, Mr. Maldonado was arrested for assault and battery, and in 1982, he
9 seems to have been arrested for possession of cocaine; charges were dismissed in
10 both cases. (Doc. 15, Ex. BB, p. 7.) Records pertaining to the 1981 charges seem to
11 have been expunged. (Doc. 15, Ex. JJ.)

12 In 1982, Mr. Maldonado returned to Peru for about a month and reentered
13 the country using a fraudulently obtained United States passport. (Doc. 15, Ex. BB,
14 p. 4; Ex. FF, p. 1-2.) He obtained this passport by using the aforementioned false
15 birth certificate, and on March 14, 1983, he was convicted of violating 18 U.S.C. §
16 1542 for false statement in the application and use of a United States passport.
17 (Doc. 15, Ex. FF, p. 1-2.) He received a suspended sentence and a fine of \$750.
18 (*Id.*)

19 Mr. Maldonado renewed his petition for naturalization on November 10,
20 1983. (*See* Doc. 15, Ex. H.) He concurrently filed a new application for
21 naturalization. (Doc. 15, Ex. I.)
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24 ¹Defendant incorrectly cites Exhibits F and D as "noting 'NOT LPR' and 'improper
25 enlistment' as reasons for recommending denial[;]" Exhibit F is Mr. Maldonado's certificate of
26 honorable discharge, and Exhibit D is the birth certificate of one of Mr. Maldonado's children.
27 (Def.'s Mot. p. 4:13, 39:4; Doc. 15, Ex. F, Ex. D.) Exhibit G, however, is Mr. Maldonado's
28 original petition for naturalization; it notes "NOT LPR" under "Documents presented:" and
"INV - Improper Enlistment" under "Action or documents still required." (Doc. 15, Ex. G.)
However, the meaning of these terms in this context is less than apparent.

1 At some point prior to 1984, deportation proceedings were initiated against
2 Mr. Maldonado. (*See* Doc. 15, Ex. J, p. 2; Ex. A.) On October 20, 1983, the INS
3 District Director issued an order to show cause why Mr. Maldonado should not be
4 deported. (*See* Doc. 15, Ex. M.)

5 Hearing nothing from the INS as to his previous petitions for naturalization,
6 Mr. Maldonado filed a third petition for naturalization in December of 1984. (Doc.
7 15, Ex. J.) In February of 1986, Mr. Maldonado received a Notice to Appear for his
8 naturalization interview. Defendant contends that the interview was continued, but
9 that the INS failed to follow up with him. (Defs.' Mot. p. 4:23-5:4.) Mr.
10 Maldonado then filed a fourth petition in United States District Court for the
11 Eastern District of Pennsylvania in March of 1986. (Doc. 15, Ex. K.)

12 In that same March of 1986, an IJ found Mr. Maldonado "deportable as
13 charged" in deportation proceedings. (Doc. 15, Ex. BB, p. 4.) The IJ did not advise
14 Mr. Maldonado of his right to apply for suspension of deportation. (*See* Doc. 15,
15 Ex. Z.) The IJ granted Mr. Maldonado voluntary departure on or before May 14,
16 1986, or any such extension that the INS District Director might grant thereafter.
17 (Doc. 15, Ex. BB, p. 9.) The IJ also ordered Mr. Maldonado deported in the
18 alternative if he did not comply with the terms of voluntary departure. (*Id.*) Mr.
19 Maldonado appealed the IJ's 1986 order. (Doc. 15, Ex. CC.) The appeal was
20 dismissed on January 13, 1989, and the voluntary departure was extended until 30
21 days past the order dismissing the appeal. (Doc. 15, Ex. DD.) Despite being
22 ordered to voluntarily depart prior to February 13, 1989, Mr. Maldonado remained
23 in Maryland until July 23, 1991. (*See id.*; Doc. 20-2, p. 2-13.)

24 Mr. Maldonado filed an application for permanent residence, which INS
25 received on September 1, 1987. (Doc. 15, Ex. L.) INS rejected this application on
26 May 3, 1988, citing its October, 1983 order to show cause and concluding that Mr.
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1 Maldonado should have filed a motion to reopen the case in immigration court in
2 Washington D.C. instead. (Doc. 15, Ex. M.)

3 In response to a Freedom of Information Act request, INS informed Mr.
4 Maldonado that it had no records of his petitions for naturalization on August 10,
5 1988. (Doc. 15, Ex. O.) INS sent another similar response to Mr. Maldonado's
6 attorney on January 9, 1989. (Doc. 15, Ex. R.) In July of 1989, Mr. Maldonado's
7 attorney filed another petition for naturalization on his behalf. (Doc. 15, Ex. Q.)

8 On February 21, 1992, Mr. Maldonado was convicted of one count of
9 conspiracy to distribute cocaine and possession of cocaine with intent to distribute
10 in violation of 21 U.S.C. §§ 841(a)(1) and 846, and seven counts of unlawful
11 distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). (Doc. 20-2, p. 2; *see*
12 *United States v. Maldonado*, 989 F.2d 496 (4th Cir. 1993).) He received a sentence
13 of fourteen years, of which he served eleven. (Doc. 15, Ex. X.) After being
14 released from prison on October 3, 2003, Mr. Maldonado went into the custody of
15 Immigrations and Customs Enforcement (ICE), a branch of the Department of
16 Homeland Security (DHS). (*See* Doc. 15, Ex. X; Ex. Y.)

17 On October 10, 2003, Mr. Maldonado filed a petition for a writ of habeas
18 corpus in United States District Court for the District of Maryland seeking a
19 determination of his naturalization and a stay of deportation proceedings. (Doc. 15,
20 Ex. W.) United States Citizenship and Immigration Services ("CIS") produced a
21 report indicating its findings of fact, conclusions of law, and recommendation that
22 Mr. Maldonado's petition be denied. (*See id.*; Doc. 15 Ex. X (CIS' report).) The
23 court granted Mr. Maldonado a stay of deportation proceedings pending resolution
24 of the matter. (Doc. 15, Ex. W.)

25 CIS' report applied the moral character component of the residency
26 requirement of Title III of the Immigration and Nationality Act, as that act existed
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1 on March 7, 1986, to Mr. Maldonado's conduct up to the point at which he would
2 have been granted citizenship, despite the possibility that Mr. Maldonado's
3 military service may have exempted him from a requirement of continuous
4 residency. (Doc. 15, Ex. X (applying 8 U.S.C. §§ 1427, 1439 (1982))). Taking Mr.
5 Maldonado's cocaine distribution conviction into account, CIS recommended that
6 his petition be denied on the ground that he had not established being a person of
7 good moral character up to the point of possible admission to citizenship. (*Id.*)

8 The District Court apparently followed CIS' recommendations, dismissing
9 his petition and lifting the stay on his deportation proceedings on June 24, 2004.
10 (Doc. 15, Ex. Y.)

11 Mr. Maldonado was deported on November 3, 2004 pursuant to a
12 deportation order that had been issued on January 21, 2003. (Doc. 15, Ex. KK.)
13 The 2003 deportation order referenced a prior final deportation order by the Board
14 of Immigration Appeals, presumably the 1989 dismissal. (*Id.*; *see* Doc. 15, Ex.
15 DD.)

16 Mr. Maldonado later reentered the country, and he was again deported via an
17 April 30, 2012 reinstatement of the 1986 order. (Doc. 15, Ex. LL; *see* Ex. CC
18 (1986 order).)

19 Mr. Maldonado apparently reentered the country once more in late January
20 of 2014; on April 30, 2014, the instant indictment was filed, charging him with
21 attempted reentry of a removed alien in violation of 8 U.S.C. § 1326. (Doc. 1.) The
22 indictment references Mr. Maldonado's removal from the United States subsequent
23 to October 28, 2009: the April 30, 2012 reinstatement and deportation. (*Id.*; Doc.
24 15, Ex. LL.)

25 Mr. Maldonado entered a plea of not guilty on May 14, 2014. (Doc. 9.) He
26 filed this motion to dismiss the indictment on June 16, 2014. (Doc. 15.)
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DISCUSSION

A defendant in a 8 U.S.C. § 1326 prosecution “has a Fifth Amendment right to collaterally attack a removal order because the removal order serves as a predicate element of his conviction.” *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004). To succeed in a collateral challenge to a removal order, a defendant must demonstrate: “(1) that he exhausted all administrative remedies available to him to appeal his removal order, (2) that the underlying removal proceedings at which the order was issued improperly deprived him of the opportunity for judicial review, and (3) that the entry of the order was fundamentally unfair.” *Id.* An underlying removal order is “fundamentally unfair” when: (1) the defendant’s due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects. *Id.*; *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000).

A. The 1986 IJ Order Contains an Order of Removal, and Subsequent Reinstatements of that 1986 Order Are Not Invalid because the 1986 Order Granted Voluntary Departure.

First, Defendant contends that the IJ’s 1986 order granting voluntary departure was not an order of deportation, and that as a result, the 2012 reinstatement of that order that forms the predicate for the instant indictment is invalid. (Def.’s Mot. p. 13:20-17:10.) Defendant is incorrect.

The 1986 order granting Defendant voluntary departure also ordered his deportation in the alternative if he did not comply with the terms of voluntary departure:

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1 IT IS FURTHER ORDERED that if the Respondent fails to depart
2 when and as required, the privilege of voluntary departure shall be
3 withdrawn without further notice or proceedings and the following
order shall thereupon become immediately effective: *Respondent shall*
4 *be deported from the charges contained in the Order to Show Cause.*
(Ex. BB, p. 9 (emphasis added).)

5 Mr. Maldonado's appeal of the 1986 order extended the date of his voluntary
6 departure by 30 days, requiring that he leave the country voluntarily prior to
7 February 13, 1989 or else face deportation without further proceedings. (*See id.*;
8 Doc. 15, Ex. DD, p. 3.) Mr. Maldonado was later convicted of narcotics offenses in
9 Maryland, which were committed on dates ranging from March through June of
10 1991. (Doc. 20-2, pp. 2, 5.)

11 Defendant cites *Garfias-Rodriguez v. Holder* to distinguish a grant of
12 voluntary departure from an order of removal. 702 F.3d 504, 524 (9th Cir. 2012)
13 (quoting 8 C.F.R. § 1240.26.) (“ ‘an alien granted the privilege of voluntary
14 departure ... will not be deemed to have departed under an order of removal if the
15 alien departs the United States no later than 30 days following the filing of a
16 petition for review.’ ”). (Def.'s Mot. p. 15:5-6.)

17 But the 1986 order in question explicitly contained an alternative order of
18 deportation if Mr. Maldonado were to fail to leave the country. (Doc. 15, Ex. BB,
19 p.9.) Because Mr. Maldonado did not leave the United States before the deadline of
20 February 13, 1989, he failed to depart as required, and the 1986 order immediately
21 became an order of deportation. Thus, the 2012 reinstatement of that order can
22 serve as a valid predicate for the instant indictment. *See* 8 U.S.C. § 1326(a). (*See*
23 Doc. 20-2, pp. 2, 5.)

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B. The 1986 IJ Order is Invalid, as are Subsequent Reinstatements, because the The IJ Failed to Advise Mr. Maldonado of his Apparent Eligibility for Suspension of Deportation; this Failure Violates Due Process when the Resulting Order is a Predicate for §1326 Prosecution.

Second, Defendant contends that the 2012 reinstatement of the 1986 IJ order that forms the predicate for his indictment is invalid because the 1986 IJ did not advise him of his apparent eligibility for suspension of deportation.² Defendant is correct.

“Immigration regulations require an IJ to inform an alien of ‘apparent eligibility’ for relief.” *United States v. Lopez-Velasquez*, 629 F.3d 894, 896 (9th Cir. 2010) (citing 8 C.F.R. § 1240.11(a)(2)). “[A]n IJ’s failure to so advise an alien violates due process and can serve as the basis for a collateral attack to a deportation order where, as here, the order is used as the predicate for an illegal reentry charge under § 1326.” *See id.* at 896-97. In determining whether an IJ had a duty to advise, the breach of which would violate due process, the focus is on “whether the factual circumstances in the record before the IJ suggest that an alien could be eligible for relief.” *See id.* at 900.

The Attorney General may, at his discretion, suspend deportation of an alien who meets certain requirements and whose deportation “would, in the opinion of

²Defendant also argues that the 1986 order is invalid because of the IJ’s failure to advise him of apparent eligibility for relief in the form of registry under 8 U.S.C. § 1259 (1982). (Def.’s Mot. p. 25:22-28:22.) The law in March of 1986 allowed for a discretionary grant of registry only if an alien established that he entered the United States prior to June 30, 1948. *See* 8 U.S.C. § 1259 (1982). *See* An Act to amend the Immigration and Nationality Act to revise and reform the immigration laws, and for other purposes, Pub. L. No. 99-603, 100 Stat. 3405 (Nov. 6, 1986) (updating registry date). Mr. Maldonado entered the United States in 1970, so he was not eligible for registry in the proceeding leading up to his March 14, 1986 order granting voluntary departure and ordering deportation in the alternative.

1 the Attorney General, result in extreme hardship to the alien or to his spouse,
2 parent, or child, who is a citizen of the United States or an alien lawfully admitted
3 for permanent residence.” 8 U.S.C. § 1254(a) (1982).

4 One of the requirements for eligibility for suspension of deportation is
5 continuous physical presence in the United States for specified periods of time,
6 during which the alien must maintain good moral character. 8 U.S.C. § 1254(a)
7 (1982). However, the requirement of continuous physical presence does not apply
8 to an alien who has served for a minimum of twenty-four months in active-duty
9 status in the military, and who, if no longer in the military, received an honorable
10 discharge. *See* 8 U.S.C. § 1254(b) (1982). Mr. Maldonado served in the United
11 States Army on active duty for three years, at which point he was honorably
12 discharged. (Doc. 15, Ex. E; Ex. F.) As a result of his service, the continuous
13 physical presence requirement in 8 U.S.C. § 1254(a) (1982) would not have
14 applied.³

15 Still, the requirement of good moral character corresponding to the period of
16 continuous residence in 8 U.S.C. § 1254(a) (1982) likely applies in some form to a
17 military veteran of the type specified in 8 U.S.C. § 1254(b) (1982), even though
18 such a veteran is excused from the continuous presence requirement. *See*
19 *Santamaria-Ames v. I.N.S.*, 104 F.3d 1127, 1130 (9th Cir. 1996) (stating that
20 military servicemen and women are not exempt from the good moral character
21 requirement appearing in the “Residence” section of 8 U.S.C. § 1427(a), the
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23 ³The Government seemed to assert in the July 10 hearing that the “stop-time rule” it cited
24 in its Reply would make Mr. Maldonado ineligible for exemption from the continuous physical
25 presence requirement of 8 U.S.C. § 1254(a), (b) (1982). (*See* Def.’s Reply, p. 6:1-11.) The Court
26 subsequently ordered the Government to provide authority in support of this assertion. (Doc. 24.)
27 To date, the Government has not provided any supplemental briefing on this issue. The Court
interprets the Government’s failure to provide such authority as a concession that it does not
exist.

1 statute codifying the requirements for naturalization); *see also O’Sullivan v. U.S.*
2 *Citizenship & Immigration Servs.*, 453 F.3d 809, 815 (7th Cir. 2006); *Lopez v.*
3 *Henley*, 416 F.3d 455, 458 (5th Cir. 2005); 8 C.F.R. § 329.2 (“To be eligible for
4 naturalization under [8 U.S.C. § 1440(a)], [a military veteran] applicant [for
5 naturalization] must establish that he or she . . . (d) Has been, for at least one year
6 prior to filing the application for naturalization, and continues to be, of good moral
7 character . . .”).

8 Whether the 8 U.S.C. § 1254(a) (1982) moral character requirement would
9 have applied to Mr. Maldonado in the 1986 IJ proceeding was an unsettled point of
10 law at the time. The previously cited cases applying a moral character requirement
11 of naturalization to veterans are all recent, and the previously cited regulation did
12 not contain the relevant language in 1986. *See* 8 C.F.R. § 329.2 (1986). Even if Mr.
13 Maldonado’s 1983 conviction for using a fraudulently obtained passport to enter
14 the country would otherwise have kept him from qualifying as a person of good
15 moral character, Mr. Maldonado may have been able to successfully argue that the
16 good moral character requirement did not apply to him as a three-year United
17 States Army veteran within the meaning of 8 U.S.C. § 1254(b).

18 Turning to the question of extreme hardship, Mr. Maldonado had two
19 teenage children in the United States who were citizens and who had likely been
20 living in the United States since they were born. *See Cerrillo-Perez v. I.N.S.*, 809
21 F.2d 1419, 1426 (9th Cir. 1987) (In the context of determining extreme hardship in
22 a § 1254 proceeding, “[t]he BIA must consider the specific circumstances of
23 citizen children and reach an express and considered conclusion as to the effect of
24 those circumstances upon those children.”); *see also Casem v. I.N.S.*, 8 F.3d 700,
25 703 (9th Cir. 1993) (citing *Cerrillo-Perez*, 809 F.2d at 1426) (“We have
26 admonished the INS in section 1254(a)(1) cases to appraise carefully the effect
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1 deportation would have on an alien's children who are United States citizens.")
 2 (See Doc. 15, Ex. C, D (birth certificates); Doc. 15, Ex. Z, p. 20.)

3 In short, the factual circumstances in this case were such that the Attorney
 4 General could have exercised discretion to grant suspension of deportation under 8
 5 U.S.C. § 1254 (1982). Thus, the IJ had a duty to advise Mr. Maldonado of this
 6 potential relief, and his failure to so advise is a due process violation when the
 7 removal order that resulted from that proceeding is used as a predicate in a §1326
 8 prosecution. See *Lopez-Velasquez*, 629 F.3d at 896.

9
 10 **1. The IJ's Failure to Advise Mr. Maldonado Excuses him of**
 11 **the Requirement of Exhausting Administrative Remedies.**

12 Defendant contends that he is excused from demonstrating exhaustion of
 13 administrative remedies because the IJ failed to inform him of suspension of
 14 deportation and registry.

15 "An alien is barred under 8 U.S.C. § 1326(d)(1) from collaterally attacking
 16 his underlying removal order 'if he validly waived the right to appeal that order
 17 during the deportation proceedings.' " *United States v. Pallares-Galan*, 359 F.3d
 18 1088, 1096 (9th Cir. 2004) (quoting *U.S. v. Muro-Inclan*, 249 F.3d 1180, 1182
 19 (9th Cir. 2001)). However, "where a waiver of the right to appeal a removal order
 20 is not 'considered and intelligent,' an alien has been deprived of his right to that
 21 appeal and thus to a meaningful opportunity for judicial review." *Id.* (quoting
 22 *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003)). Where " 'the
 23 record contains an inference that the petitioner is eligible for relief from
 24 deportation,' but the IJ fails to 'advise the alien of this possibility and give him the
 25 opportunity to develop the issue,' we do not consider an alien's waiver of his right
 26 to appeal his deportation order to be 'considered and intelligent.' " *Id.* (quoting
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1 *Muro–Inclan*, 249 F.3d at 1182) (internal quotations omitted).

2 Here, the record contains an inference that Mr. Maldonado was eligible for
3 relief in the form of a suspension of deportation. (Doc. 15, Ex. Z, pp. 20, 11
4 (noting that Mr. Maldonado had two United States citizen children; noting Mr.
5 Maldonado’s service in the Vietnam war).) Yet the IJ failed to advise Mr.
6 Maldonado of his apparent eligibility for suspension of deportation. As a result,
7 Mr. Maldonado did not raise or appeal this issue, and his failure to do so was not
8 considered and intelligent. *See Pallares-Galan*, 359 F.3d at 1096. Because Mr.
9 Maldonado’s waiver of the right to appeal this issue was not considered and
10 intelligent, he was deprived of his right to appeal and of meaningful access to
11 judicial review. *See id.*

12 In short, Mr. Maldonado is not barred from collaterally attacking his
13 deportation order on the ground of not having exhausted administrative remedies.
14 *See id.*

15
16 **2. The IJ’s Failure to Advise Mr. Maldonado Deprived him of**
17 **Judicial Review of his Eligibility for Suspension of**
18 **Deportation.**

19 Defendant argues that the 2011 removal proceedings deprived him of
20 judicial review because he did not know or understand that he might have been
21 eligible for suspension of deportation or registry.

22 “[A]n alien who is not made aware that he has a right to seek relief
23 necessarily has no meaningful opportunity to appeal the fact that he was not
24 advised of that right.” *Arrieta*, 224 F.3d at 1079 .

25 In light of this Court’s finding that the IJ did not make Mr. Maldonado
26 aware of his apparent eligibility for relief through suspension of deportation, the
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1 1986 removal proceeding afforded him no meaningful opportunity to seek judicial
2 review of the fact that he was not advised of that eligibility. *See id.*

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4 **3. The IJ's Failure to Advise Mr. Maldonado was**
5 **Fundamentally Unfair because Defects in his Underlying**
6 **Deportation Proceeding Violated his Due Process Rights**
7 **and Caused him Prejudice.**

8 The Court turns next to whether the entry of Defendant's order of removal
9 was fundamentally unfair. Defendant argues that the 1986 removal order, on which
10 the 2012 reinstatement is based, was fundamentally unfair because the IJ did not
11 advise him of his right to seek suspension of deportation.

12 First, as noted above, the IJ had a duty to advise Mr. Maldonado of his
13 apparent eligibility for suspension and deportation. The IJ's failure to so advise is a
14 due process violation when, as here, the removal order that resulted from that
15 proceeding is used as a predicate in a §1326 prosecution. *See Lopez-Velasquez*, 629
16 F.3d at 896.

17 Second, Mr. Maldonado suffered prejudice as a result of this defect. When
18 an IJ fails to advise an alien of his apparent eligibility for a specific type of relief,
19 the alien must establish prejudice under the second prong of § 1326(d)(3), which
20 requires the alien to make an additional showing and demonstrate "plausible
21 grounds" for relief. *See United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th
22 Cir. 2013). "Where the relevant form of relief is discretionary, the alien must make
23 a 'plausible' showing that the facts presented would cause the Attorney General to
24 exercise discretion in his favor." *United States v. Barajas-Alvarado*, 655 F.3d
25 1077, 1089 (9th Cir. 2011). The Ninth Circuit has applied a two-step process in
26 making this determination. First, the court must identify the pertinent factors
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1 informing the IJ's exercise of discretion in its determination of an alien's request.
2 *See id.* at 1089–90. Second, the court must determine whether, “in light of the
3 factors relevant to the form of relief being sought, and based on the unique
4 circumstances of the alien's own case, it was plausible (not merely conceivable)
5 that the IJ would have exercised his discretion in the alien's favor.” *Id.* at 1089.

6 The chief factors here are: (1) whether § 1254(a)'s requirement of good
7 moral character applied to Mr. Maldonado as an honorably discharged military
8 veteran of three years, and if so, whether Mr. Maldonado satisfied the requirement;
9 and (2) whether, in the opinion of the Attorney General, Mr. Maldonado's
10 deportation would have resulted “in exceptional and extremely unusual hardship to
11 the alien or to his spouse, parent, or child, who is a citizen of the United States or
12 an alien lawfully admitted for permanent residence[.]” *See* 8 U.S.C. § 1254 (1982).
13

14 First, as discussed above, it was an unsettled point of law in 1986 whether 8
15 U.S.C. § 1254(b) (1982) exempted military veterans from the moral character
16 component of § 1254(a). Section 1254(b) contains no explicit moral character
17 requirement for military veterans, and Mr. Maldonado served the country
18 honorably as a specialist in the Army for three years, two of which were during
19 Vietnam hostilities. *See* 8 C.F.R. § 329.2. (Doc. 15, Ex. F.) He could plausibly
20 have been successful in a contention that, as a veteran, 8 U.S.C. § 1254(b) (1982)
21 exempted him from the moral character component of § 1254(a)'s continuous
22 physical presence requirement.

23 Second, Mr. Maldonado's children plausibly faced extreme hardship upon
24 his deportation. In *In Re H-----*, a respondent used her sister's name on a visa
25 application in order to use a steamship ticket that had already been purchased in
26 her sister's name. 5 I. & N. Dec. 416, 417 (BIA 1953). The court found that this
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1 situation posed “exceptional and extremely unusual hardship” to the respondent
2 herself because, among other factors, “she would be unable to return to the United
3 States in the event that she were required to leave. . . .” as a result of her past fraud.
4 *See id.* at 418. In finding hardship, it noted that the respondent had no dependents
5 in this country, and it focused on the innocuous character of the misrepresentation.
6 *See id.* at 417-18.

7 Here, were Mr. Maldonado deported, he would similarly have been unable to
8 subsequently obtain an immigrant visa. *See* 8 U.S.C. § 1182(a)(6)(C)(i) (“Any
9 alien who, by fraud or willfully misrepresenting a material fact, seeks to procure
10 (or has sought to procure or has procured) a visa, other documentation, or
11 admission into the United States or other benefit provided under this chapter is
12 inadmissible.”). The character of Mr. Maldonado’s misrepresentation in obtaining
13 a passport using a false birth certificate was not as innocuous as that posed in *In Re*
14 *H-----*. 5 I. & N. Dec. at 417.

15 As such, it is likely that Mr. Maldonado’s deportation would have
16 permanently deprived his two dependent teenage citizen children, for whom it
17 would seem that Peru was a foreign land, of their father’s meaningful presence in
18 their lives. (*See* Doc. 15, Ex. C, D (birth certificates); Ex. Z, p. 20; Ex. HH.) By
19 March of 1986, the INS had allowed Mr. Maldonado’s children to grow up in the
20 United States during the three years it had already delayed adjudicating his
21 multiple petitions for naturalization. *See Casem*, 8 F.3d at 703 (noting the potential
22 effect of INS delay on hardship to a child under a different statute).

23 In short, it is plausible that the Attorney General would have found extreme
24 hardship to Mr. Maldonado’s children in the form of permanent loss of the familial
25 companionship and financial support of their father. *See Cerrillo-Perez*, 809 F.2d
26 at 1426 (“[T]he Attorney General is not required to find extreme hardship in every
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1 case in which an alien illegally in this country is the parent of an American born
2 child. Rather, he (or more precisely his delegee, the BIA) must determine whether
3 the statutory requirement has been met on a case by case basis, after first
4 considering all the relevant individual circumstances.”). (See Doc. 15, Ex. H; Ex.
5 P.)

6 According to the relevant factors, it is plausible that the Attorney General
7 would have exercised discretion in granting Mr. Maldonado suspension of
8 deportation. Thus, Mr. Maldonado suffered prejudice as a result of the IJ’s failure
9 to advise him of his eligibility for this form of relief. See *Barajas-Alvarado*, 655
10 F.3d at 1089.

11 Accordingly, Mr. Maldonado’s underlying 1986 removal order was
12 fundamentally unfair, as was the 2012 reinstatement of it. See *Ubaldo-Figueroa*,
13 364 F.3d at 1048.

14
15 **C. Mr. Maldonado May Have Been Entitled to Citizenship in 1978 or**
16 **1983, but he has not Demonstrated that his Naturalization**
17 **Proceedings are Subject to Collateral Attack.**

18 Defendant cites *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 (1987),
19 in support of a contention that due process requires that he be allowed to challenge
20 his immigration status by collaterally attacking his previous naturalization
21 proceedings. (Def.’s Mot. p. 36:14-37:6.)

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1 [W]here a determination made in an administrative proceeding is to
2 play a critical role in the subsequent [] imposition of a criminal
3 sanction, there must be some meaningful review of the administrative
4 proceeding *This principle means at the very least that where the*
5 *defects in an administrative proceeding foreclose judicial review of*
6 *that proceeding, an alternative means of obtaining judicial review*
7 *must be made available before the administrative order may be used*
8 *to establish conclusively an element of a criminal offense.* The result
of those proceedings may subsequently be used to convert the
misdemeanor of unlawful entry into the felony of unlawful entry after
a deportation. Depriving an alien of the right to have the disposition in
a deportation hearing reviewed in a judicial forum requires, at a
minimum, that review be made available in any subsequent
proceeding in which the result of the deportation proceeding is used to
establish an element of a criminal offense.

9 *Mendoza-Lopez*, 481 U.S. at 838-39 (emphasis added).

10 Defendant contends that an examiner recommended denial of his initial
11 naturalization petition based on an erroneous understanding of the law, which then
12 caused him to withdraw that petition. (*See* Def.'s Mot. p. 38:20-39:5.) It would
13 appear that Defendant may have been entitled to citizenship at the time he filed his
14 initial petition in 1978, which was withdrawn. *See* 8 U.S.C. § 1440 (1976). It
15 would also appear that Defendant may have been entitled to citizenship at the time
16 he filed his other petitions beginning in 1983, the eventual adjudication of which
17 was delayed until 2003. *See* 8 U.S.C. § 1440 (1982).

18 But the Court does not address these questions now. Defendant has made no
19 showing here that he was deprived of judicial review of the denial of his
20 naturalization, or that he is now otherwise entitled to collaterally attack his
21 naturalization proceedings. *See Mendoza-Lopez*, 481 U.S. at 838-39.

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CONCLUSION AND ORDER

For the reasons stated above, Defendant's motion to dismiss the indictment is **GRANTED** and count one of the Indictment (attempted entry after deportation, 8 U.S.C. § 1326(a) and (b)) is dismissed, and **JUDGMENT** is entered.

IT IS SO ORDERED.

DATED: July 17, 2014


M. James Lorenz
United States District Court Judge